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Supreme Court, U.S.
FILED

Docket No. 95148 9 DEC 26 1995

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

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MARK DEAN GODDARD,
*Petitioner,*

vs.

KANSAS DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX,
*Respondent.*

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**ON PETITION FOR CERTIORARI**
**TO THE**
**SUPREME COURT OF THE STATE OF KANSAS**

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John P. Gerstle II - KS #07793
*Counsel of Record*
Richard W. Parker - KS #10470
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Overland Park, KS 66210
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6 pp

## QUESTION PRESENTED FOR REVIEW

Is it a denial of due process and/or a denial of equal protection of the laws for the Kansas Supreme Court in its rules, specifically Rule (b), to require that a citizen from the State of Kansas and of the United States of America pay a statutory bond equal to 125% of the amount of a tax assessed by the State of Kansas Department of Revenue before the Appellate courts of the State of Kansas may hear a constitutional issue regarding the statute itself which imposes the tax when the administrative levels of the Kansas State Department of Revenue do not have authority to hear constitutional questions?

All the parties to the proceeding in the Supreme Court of Kansas whose judgment is sought to be reviewed is as follows:

Carla Stovall
Attorney General
State of Kansas
Kansas Judicial Center
301 W. 10th Avenue
Topeka, Kansas 66612

Carl Edwards, Attorney
Board of Tax Appeals
Docking State Office Building
915 S. W. Harrison
4th Floor
Topeka, Kansas 66612

Mr. Jack Shriver, Chairman
Board of Tax Appeals
915 S.W. Harrison
4th Floor
Topeka, Kansas 66612

Director of Taxation
Docking State Office Building
915 S. W. Harrison
3rd Floor
Topeka, Kansas 66612

Brian Cox, Attorney
Legal Services Bureau
Kansas Dept. of Revenue
Docking State Office Bldg.
915 S. W. Harrison
Topeka, Kansas 66612

Mark Burghart,
General Counsel
Department of Revenue
Docking State Office Building
915 S. W. Harrison
Topeka, Kansas 66612

## REASON FOR REVIEW

The bond requirement to review a constitutional question while lower levels have no authority to review a constitutional question while the burden of proof at all times is on the citizen and the State is presumed to be correct by statute imposes a insurmountable issue in that the citizen is denied due process in that no opportunity to be heard is allowed without the necessary financial resources.

## STATEMENT FOR BASIS OF JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

i. Judgment was entered by the Supreme Court on September 26, 1995.

ii. 28 U.S.C. Section 2105 confers jurisdiction upon the United States Supreme Court to review on a certiorari of the judgment of the Kansas Supreme Court herein.

iii. Notifications required by Rule 29.4 (c) have been made as the constitutionality of Kansas Supreme Court rule and the underlying statute of the Marijuana and Drug Tax Act has been drawn into question by serving a copy of this petition for certiorari upon the Attorney General of the State of Kansas.

## CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Fourteenth Amendment

> Amendment Fourteen in the United States Constitution, Section 1. Citizenship; Privileges or immunity; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor denied any person within its jurisdiction equal protection of the laws.

## STATEMENT OF THE CASE

On March 21, 1988, Mark Dean Goddard and Robert Lee Foster pled nolo contendere to the charges of attempted possession of cocaine and sale of cocaine. On July 15, 1988, the

Kansas Department of Revenue issued a Notice of Assessment of tax upon marijuana and controlled substance to Robert Foster in the total of amount of $1,144,460.00. A like notice of assessment in an identical amount was issued by the Department of Revenue on September 29, 1988 to Mark Goddard. On April 23, 1992, a formal hearing was held by the Department of Revenue. On September 15, 1992, the Administrative Hearing Officer entered an order denying the appeal of the taxpayers, upholding the assessment of the department. (It was at this juncture that the constitutionality of the underlying state statue was first challenged.) On October 12, 1992, the tax payers filed a Notice of Appeal to the Board of Tax Appeals. On June 1, 1994, a formal hearing was conducted before the Board of Tax Appeals. On January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the department of Revenue. (The Board of Tax Appeals specifically denoted in its order that it was without authority to render decision on constitutional questions). On February 20, 1995, the tax payers filed a Petition for Reconsideration, which was denied by the Board of Tax Appeals. On April 7, 1995, the tax payers filed their Notice of Appeal, Petition for Judicial Review in the Court of Appeals. At that time, the tax payers filed their motion to waive the statutory bond. The Kansas Court of Appeals on May 5, 1995, denied its Motion to Waive Bond and ordered the parties to brief the issue.

Tax payers then petitioned the Kansas Supreme Court to review the Court of Appeal's decision regarding the waiver of bond. The Kansas Supreme Court by order dated September 26, 1995, denied the tax payers' petition for review.

The due process of law and equal protection constitutional questions were raised at every step of the appellate process from the initial appeal within the State of Kansas Department of Revenue through the petition to the Supreme Court of the State of Kansas. The issues were raised in writing in the briefs to each of the entities ruling upon the question.

## ARGUMENT

The tax payers' argument for granting of a petition of certiorari for review of the ruling of the Kansas Supreme Court is basically quite simple. It is a denial of due process and of equal protection of the laws to require the taxpayers to post a bond in the amount of 125% of the tax assessed when they are challenging the constitutionality of the statute which assesses the tax and at the same time, the statute they are challenging presumes the tax to be accurate and places the burden of proof upon the tax payers to show the tax inaccurate. See, KSA 79-5205 (c). In other words, the tax payers are presumed wrong until they can prove themselves correct. However, no judicial authority can review the statute until such time as they have posted a bond in the amount of 125% of the tax. In this particular case, the tax is $1,144,460.00. To post a bond of 125% of that amount would, for most citizens of these United States, be impossible. Therefore, Kansas Supreme Court Rule 9.03 requiring the posting of the bond in the amount of 125% is a denial of due process and is a denial of equal protection of the laws.

Respectfully submitted:

John P. Gerstle II
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Overland Park, KS 66210
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FAX: (913) 451-7523

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Docket No.

In The

# Supreme Court of the United States

October Term, 1995

**MARK DEAN GODDARD,**
***Petitioner,***

**vs.**

**KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,**
***Respondent.***

## APPENDIX

JOHN P. GERSTLE II-KS #07793
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RICHARD W. PARKER-KS #10470
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35 pp

SUPREME COURT ORDER DISTRICT CASE NO.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF NO. 95-73903-AS MARIJUANA AND CONTROLLED SUBSTANCES TAX AND IN THE MATTER OF TEE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND COANTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANTS, MARK DEAN GODDARD AND ROBERT LEE FOSTER.
DENIED.
RESPONSE NOTED.

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE:09/26/95. CAROL G. GREEN CLERK

COURT OF APPEALS ORDER DISTRICT CASE NO.

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF

NO. 95-73903-A

MARIJUANA AND CONTROLLED SUBSTANCES TAX AND IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND COANTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:
MOTION BY APPELLANT, MARK DEAN GODDARD AND ROBERT LEE FOSTER FOR REHEARING AND MODIFICATION. DENIED. RESPONSE NOTED.
BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE: 08/14/95. CAROL G. GREEN CLERK

No. 95-73,903

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

*In the Matter of the Appeal of*
*Mark Dean Goddard, et al.*

ORDER

In the absence of a response to this court's order dated June 25. 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b).

DATED: July 24,1995.

FOR THE COURT

/s/

EDWARD LARSON, Judge

COURT OF APPEALS ORDER DISTRICT CASE NO.

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110Th ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF TEE APPEAL OF MARK DEAN GODDARD FROM AN ORDER OF TEE DIRECTOR OF TAXATION ON ASSESSMENT OF

NO. 95-73903-A

MARIJUANA AND CONTROLLED SUBSTANCES TAX
AND
IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF TEE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND COANTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

RESPONSES TO COURT ORDER. MOTION TO WAIVE BOND DENIED. APPELLANT'S HAVE 10 DAYS TO FILE THE REQUIRED BOND.

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE: 06/26/95. CAROL G. GREEN CLERK

No. 95-73,903

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

*In the Matter of The Appeal of*
*Mark Dean Goddard, et at*

ORDER

Appellants' motion to waive bond is denied on present showing. The parties are ordered to address the issue of an appropriate bond by written responses to be served and filed on or before May 22, 1995. Appellants' failure to respond will result in dismissal of the appeal without further notice.

DATED: May 5,1995.

FOR THE COURT

/s/

J.P. BRAZIL, Judge

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16575-DT

AND

IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16576-DT

CORRECTIVE ORDER DENYING RECONSIDERATION

Now, on this 6th day of March, 1995, the above-captioned matters come on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

The Board finds that the Taxpayer has timely filed a Petition for Reconsideration with the Board pursuant to K.S.A. § 77-529 (a). The facts surrounding service of the Taxpayer require explanation. The Taxpayers' attorney filed a Notice of Appeal with the Board on October 12, 1992. At that time, the attorney's address was Suite 120, 10901 Lowell, Overland Park, Kansas 66210. On January 18, 1994, the attorney filed a Notice of Change of Address with the Board. The new (and current) address is Suite 104, 7600 West 110th Street, Overland Park, Kansas 66210-2392.

The hearing in these matters was held on June 1, 1994, and the order was certified and sent out on January 30, 1995. The Board sent copies of the Order to the Taxpayers' attorney and the Department's attorney on that date. However, the Board sent the Order to the Taxpayers' attorney at his old Lowell address.

On or before February 24, 1995, the Taxpayer's attorney had a copy of the January 30th Order.

The Taxpayers' attorney then requested reconsideration and submitted evidence that the Order was sent on January 30, 1993 to the old Lowell address.

The Board finds that a clerical error was made in the service of the January 30th Order. In the Kansas Administrative Procedures Act, it states that service is presumed where there is a written certificate on the Order, as was there was in this case. K.S.A. § 77-531. However, the Taxpayer has presented enough evidence to overcome this presumption. The evidence shows that service was complete, not on

January 30, 1995, but on February 24, 1995, when the Taxpayers attorney actually received the Order.

In the Taxpayer's Petition for Reconsideration, the Taxpayers' attorney brings up several issues for the Board's consideration. The Board finds that most of these are without merit and do not warrant any further consideration. However, one issue brought up by the Taxpayers attorney states that the Board's Order is in error wherein it states that in ¶ 8A that, "A. [t]he Taxpayers were convicted of possession of cocaine That particular sentence fragment should be corrected to read as follows: "A. The Taxpayers were convicted of the sale of cocaine

Inasmuch, as the Taxpayer did not plead guilty to the possession of marijuana, the Board cannot state that the Taxpayers admitted to possessing the marijuana. However, the Department found that the Taxpayers were in possession of the cocaine, as well as some marijuana found at their residence. In this case, the criminal conviction is not dispositive of the issue of whether or not the Taxpayers were in possession of the cocaine that was taxed. The burden of proof is greater to sustain a criminal conviction than a tax assessment.

The Taxpayer has the burden to overturn the assessment which is presumed to be valid and correctly determined. K.S.A. §79-5205 (c). The evidence presented on behalf of the Taxpayers does not overcome

this presumption. Other than the criminal conviction for other charges, no evidence is presented.

Therefore, the Board finds that upon review of the Taxpayers' Petition for Reconsideration, that no new or additional evidence is offered that would persuade the Board that the original order should be modified, save for the one correction made herein.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that, the above-captioned Petition for Reconsideration should be, and the same is hereby, denied. IT IS ALSO ORDERED that ¶ 8A shall be corrected to read as follows: "A. The Taxpayers were convicted of the sale of cocaine...."IT IS FURTHER ORDERED that the Order dated January 30, 1995, entered herein shall be sustained in all other respects.

IT IS SO ORDERED THE BOARD OF TAX APPEALS

/seal/

/s/
Jack Shriver, Chairman

/s/
Rita Maichel, Secretary

/s/
Myra B. Gross, Member

/s/
Carl Edwards, Attorney

/s/
Fred J. Hirsch, Member

/s/
Lawrence L. Tenopir, Member

/s/
Perl M. Bass, Member

CERTIFICATION

I, Rita Maichel, Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of the order in Docket Nos. 92-16575-DT and 92-16576-DT was placed in the United States Mail, on this 6th day of March, 1995 addressed to:

Richard W Parker, Attorney at Law
7600 W 110th Street
Suite 104
Overland Park, KS 66210-2392;

and a copy was placed in capitol complex building mail, addressed to:

Director of Taxation
915 S.W. Harrison, 3rd Fl
Topeka, KS 66612

Brian Cox, Attorney ,
c/o General Counsel
Department of Revenue
DSOB, 915 S.W. Harrison, 2nd
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

/s/

Rita Maichel, Secretary

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16575-DT

and

IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX.

Docket No. 92-16576-DT

ORDER

Now, on this 30th day of January, 1995, the above-captioned matters come on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

After considering all of the evidence presented

therein, and being fully advised in the premises, the Board finds as follows:

1. The Board has jurisdiction of the subject matters, the parties, proper and timely appeals having been filed, pursuant to K.S.A. §74-2435.
2. The subject of these applications are appeals from assessments of Marijuana and Controlled Substances Tax imposed by the Director of Taxation pursuant to K.S.A. §79-5201 et seq.

3. Before considering these matters fully, the Board motes immediately that K.S.A. § 79-5205 (c) (1991 Supp.) states: "The tax, penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is on the taxpayer to show their incorrectness or invalidity...."

   By law, the burden is upon the Taxpayers to show that the assessments at issue are invalid or incorrect.

4. A tax is imposed upon marijuana and controlled substances in the possession of a dealer. K.S.A. § 79-5202. A "Dealer" is

defined, for tax purposes, as a person who illegally manufactures, produces, ships, transports, imports, acquires or possesses in any manner:

(a) 28 or more grams of marijuana,
(b) one or more grams of any con trolled substance, or
(c) ten or more dosage units of con trolled substance not sold by weight.

K.S.A. § 79-5201(c)

5. The assessment at issue was based on possession of 63.3 grams of marijuana at $3.50 per gram (or approximately $100.00 per ounce), or portion thereof; and 2,859.2 grams of cocaine, a controlled substance, at $200.00 per gram, or portion thereof; and a 100% penalty for the absence of a stamp or other indicia indicating that the tax had been paid. The total assessment amounted to $1,144,460.00. Both Mr. Foster and Mr. Goddard are jointly and severally liable for the tax.

6. The Taxpayers' Attorney contends that the U.S. Supreme Court's decision in Department of Revenue of Montana v. Kurth Ranch, et al., 1994 WL 237615 (U.S.) should be followed. In Kurth Ranch, the Defendant/Taxpayer, in an effort to save the family ranch, embarked

on a scheme to grow marijuana. Eventually, the law caught up with the Kurth family, and they were assessed a tax pursuant to the State of Montana's Dangerous Drug Tax. The Kurths were taxed $181,000 on 1,811 ounces of harvested marijuana—approximately $100.00 per ounce.

Ultimately, the United States Supreme Court struck down Montana's Dangerous Drug Tax on the grounds that it was a punitive "tax." The assessment was so excessive that it could not be classified as remedial. See also U.S. V. Maiper, 490 U.S. 435 (1989). The Court stated that the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction. Kurth Ranch at 1994 WL 237615, *6 (U.S.).

7. The Board has determined that the Kurth Ranch decision is not applicable to the case at bar. The Board has no authority to rule on constitutional issues. Were the Board to follow Kurth Ranch, it would have to find that Article 52, of Chapter 79 of the Kansas Statutes Annotated is unconstitutional. The Board is specifically prohibited from ruling on constitutional issues. "It is the [Board]'s duty to presume that the statutes are constitutional and valid." Feiten Truck Line v. State Board of Tax Appeals, 183 Kan 287, 293, 327 P.2d 836 (1958).

In fact, the Kansas Supreme Court has held that Article 52, of Chapter 79 of the Kansas Statutes Annotated is constitutional. State V. Durrant, 244 Kan. 522, 526, 769 P.2d 1174 (1989). See also State v. Berberich, 248 Kan. 854, 862, 868, 811 P.2d 1192 (1991). The Board finds that it is bound by the decisions of the Kansas Supreme Court in this matter. The Kansas judiciary will have to consider the Taxpayer's request to apply Kurth Ranch. See In re Residency Application of Bybee, 236 Kan. 443, 449, 691 P.2d 37 (1984)

8. The facts which have been stipulated to are as follows:
A. The Taxpayers were convicted of possession of cocaine; and,

B. the Taxpayers were convicted of attempted possession of cocaine.

9. As stated above, the law requires a tax on the marijuana or cocaine in the illegal possession of a dealer. For purposes of this statute, "dealer" is defined as one who has possession of the drugs.

10. The Taxpayers knowingly and voluntarily admitted to possessing certain amounts of cocaine, and therefore, they knowingly and voluntarily admitted to owing the appropri-

ate tax on those amount if illicit substances. No facts are presented to indicate otherwise. Therefore, the Board finds that the Department's assessment should stand.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that the Taxpayers' appeals should be and are hereby, denied.

If any party to this appeal feels aggrieved by this decision, they may file a written petition for reconsideration with this Board. The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. A copy of the petition, together with all documents submitted therewith, shall be nailed to the opposing party at the same time the petition is mailed to the Board. Failure to notify the opposing party shall render any subsequent order voidable. The written petition must be received by the Board within fifteen (15) days of the certification date of this order (allowing an additional three days for mailing pursuant to statute if the Board serves the order by mail). If at 5:00 pm on the last day of the specified period the Board has not received a written petition for reconsideration, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED THE BOARD OF TAX APPEALS

/seal/

/s/
Jack Shriver, Chairman

/s/
Rita Maichel, Secretary

/s/
Myra B. Gross, Member

/s/
Carl Edwards, Attorney

/s/
Fred J. Hirsch, Member

/s/
Lawrence L. Tenopir, Member

/s/
Perl M. Bass, Member

CERTIFICATION

I, Rita Maichel, Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of the order in Docket Nos. 92-16575-DT and 92-16576-DT and any attachments thereto, were placed in the United States Mail, on this 30th day of January, 1995, addressed to:

Richard W Parker, Attorney at Law
7600 W 110th Street Suite 104
Overland Park, KS 66210-2392

and a copy was placed in capitol complex building mail, addressed to:

Director of Taxation
DSOB, 915 S.W. Harrison, 3rd Fl
Topeka, KS 66612

General Counsel, Dept of Revenue
DSOB, 915 S.W. Harrison, 2nd Fl
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

/s/

Rita Maichel, Secretary

BEFORE THE DIRECTOR OF TAXATION OF THE
KANSAS DEPARTMENT OF REVENUE

| | | |
|---|---|---|
| IN THE MATTER OF THE APPEAL OF | ) | |
| ROBERT L. FOSTER | ) | |
| FROM AN ASSESSMENT FOR THE TAXATION OF | ) | Reg. No.: 88-0026 |
| MARIJUANA OR CONTROLLED SUBSTANCES | ) | Docket No.: 88-304 |
| PURSUANT TO K.S.A. 79-5101 ET SEQ. | ) | |
| DATED JULY 15, 1988 | ) | |

## FINAL ORDER

ON THE 15th day of September, 1992, the above captioned matter comes on for consideration before Jim Weisgerber. Designee of the Director of Taxation.

On July 15. 1988. the Department: of Revenue issued an assessment against Taxpayer, pursuant to K.S.A. 79-5201, et seq., for taxes and penalty on marijuana and controlled substances in the amount of $1,144,460.00. On July 25. 1988, Taxpayer perfected his appeal to the Director.

A brief history of the motions made and orders issued in regard to this matter may' be obtained by reference to the Director's Designee's Order of December 10, 1991, captioned Order Regarding Taxpayer's Motion For Summary Judgment Dated November 14. 1991.

A formal hearing was conducted on April 23, 1992. Taxpayer appeared in person, and by his attorney, Richard W. Parker. Kansas Department of Revenue appeared by its attorney, Brian Cox. There were no other appearances.

AFTER BEING FULLY ADVISED IN THE PREMISE, and after carefully considering the evidence and arguments presented herein, the Director's Designee makes the following findings of

fact and conclusions of law:

This case was presented on what might loosely be described as stipulated facts. By' letter dated March 3]. 1992. Taxpayer stipulated that the substance forming the basis of the majority of the Department's assessment was cocaine, and that no drug tax stamps had been affixed to the cocaine. By the same letter, Taxpayer indicated he might at some point be willing to stipulate as to the weight of the cocaine.

At the formal hearing, Taxpayer sought, and was allowed, to admit into evidence: (1) the notice of assessment against Taxpayer dated July 15, 1988, and (2) the Department's form BT/dt-05, "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws", which law enforcement officials completed and returned to the Department to report this matter, and upon

which the Departments assessment was based. Since the second page of the BT/dt-05 was not immediately available, the Department agreed to submit it after the hearing. In addition. Taxpayer asked that the hearing officer take note of the Journal Entry of Taxpayer's criminal conviction on charges of attempted possession of a controlled substance which stemmed from the same situation which gave rise to the drug tax assessment. This request was granted.

Upon submission of documents noted above, and after reserving the right to present various statutory and Constitutional arguments as to the issues of possession and weight. Taxpayer rested his case. The Department of Revenue then moved for the administrative equivalent of summary judgment or a directed verdict on grounds that Taxpayer had failed to overcome the statutory presumption of the correctness and

validity of the Department's assessment by a preponderance of the evidence. After hearing arguments on the Motion, the Motion was taken under advisement. After further discussion. and reserving the right to respond to Taxpayer's legal arguments, the Department: also rested.

Taxpayer came to the hearing with his legal arguments prepared, and submitted them to the hearing officer at that time. The Department of Revenue requested, and was granted, 30 days (until May 22, 1992) to submit its response. Taxpayer was given 10 days to respond to the Department's brief, and reserved the option to request oral a r g u m c n t.

On May 22. 1992, the Department filed a Motion For Extension Of Time To Submit Brief. This Motion was granted over Taxpayer's objection. The Department was given until June 22, 1992, to submit its brief, and Taxpayer was given until July 1, 1992, to respond.

The Department filed its brief on June 23, 1992. Taxpayer responded on June 29, 1992, by filing a Motion To Strike KDR's Response To Taxpayer's "Formal Hearing Brie!"'. In his cover letter, Taxpayer also requested oral argument on the briefs.

At the same time, Taxpayer also filed a Motion to Compel which alleged the Department had not yet submitted the form BT/dt-05, "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws". The Motion sought to compel the Department to submit the document, and requested attorney's fees in the amount of $250 as a consequence of having to pursue the Motion to Compel. The Department s only response was to submit the "Information" form on July 13, 1992, prior to the hearing officer acting on Taxpayer's Motion.

Taxpayer's Motions must be addressed prior to considering the arguments presented. With regard to Taxpayer's Motion To Strike KDR's Response To Taxpayer's "Formal Hearing Brief", the Director's Designee finds the Motion should be granted. Despite an extension of time to file, the Department's brief was filed out of time. As a result of this ruling. the Department's brief will not be considered in deciding this case.

With regard to Taxpayer's Motion to Compel, the Director's Designee finds the Motion should be denied. Filing of the Motion had the desired effect in that it prompted the Department to submitted the document in question. The Department will not be required to pay attorney's fees.

In light of the fact the Department's brief will not be considered in deciding this case, Taxpayer request for oral argument s on the briefs is denied.

Since all motions have been addressed, it is appropriate to consider the argument's raised in Taxpayer's Formal Hearing Brief, and the Department's motion for summary judgment or a directed verdict.

Taxpayer's first argues that the "information" upon which the Department based its notice of assessment and the notice of assessment: itself arc defective. As a basis for this argument. Taxpayer notes both the "information" and the assessment fail to notify him as to when the alleged possession occurred. As a result of this failure, Taxpayer asserts he was denied the opportunity to properly defend himself since he was unable to determine either the factual basis surrounding the assessment, or when the applicable statute of limitations might expire.

Taxpayer's first argument must be rejected for two reasons. First, while it would undoubtedly be a

good idea to do so, nothing in the "Drug Tax Act" requires that either the assessment or the "information" upon which the assessment is based make reference to a date of alleged possession. Second, since the long history of this case clearly indicates Taxpayer has been fully involved in defending this matter since shortly after the assessment was issued, Taxpayer cannot now be heard to say he did not understand the factual situation upon which the Department's assessment was based.

Taxpayer next argues the tax as imposed by the Department is improper in that it results in double taxation. Taxpayer notes that not only he but also one Mark Goddard have been assessed an identical amount of tax arising from the same factual situation. Taxpayer argues that, as a result of this situation, the tax is improper since: (1) double taxation is unconstitutional as a general matter; (2) the controlling statutes do not permit imposing the same tax against multiple dealers; (3) if fully collected from two or more taxpayers the amount of tax collected would exceed the Department's statutory authority to collect; and (4) if the drug tax is allowed to stand the substances in question could be subject to both the drug tax and property tax under K.S.A. 79-101.

Taxpayer's second argument must be rejected for three reasons. First, Taxpayer has failed to demonstrate that the "double taxation" he alleges somehow violates Constitutional requirements. Second, in In the Matter of the Appeal of Thomas D. Bos. etc., Docket No. 89-1357-DT, the Board of Tax Appeals approved the concept of joint and mutual liability for drug tax arising from a joint venture in a case where the Department assessed three taxpayer's for the same amount of tax. Finally, there is no indication the Department of Revenue ever intended to attempt to "expand" the

theory of joint and mutual liability and collect the tax twice by attempting to collect all of the tax from both Taxpayer and Mr. Goddard.

Taxpayer next argues the weight of the controlled substances upon which the tax is assessed is inaccurate. Taxpayer notes the "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws" upon which the Departments assessment was based includes a reference to certain quantities of the drugs being found on the person of another individual or in a storage facility'. Taxpayer argues this information, in and of itself, is sufficient to prove Taxpayer was not in possession of the drugs in question, thereby calling the entire assessment into doubt.

Taxpayer's third argument must be rejected for two reasons. First, since the drug tax may be imposed not only in situations involving actual physical possession, but also in situations involving manufacturing, production, shipment, transporting, importing or acquiring drugs in any other manner, the mere fact that the "Information to Make Assessment of Tax on Illegal Drugs Pursuant to Chapter 366 of the 1987 Kansas Session Laws" upon which the Departments assessment was based did not clearly indicate all the drugs in question were in Taxpayer's physical possession does not mean Taxpayer had not engaged in taxable conduct. Second, in the absence of some proof that the "Information" upon which the Department based its assessment is in error, it cannot be said the entire assessment is inherently flawed.

Taxpayer next argues he did not possess controlled substances. The gist of taxpayer's argument is that in order for the drug tax to attach, there must be a determination that the drugs in question were illegally held or possessed. Taxpayer suggests that only a

criminal conviction for possession will support such determination, and notes that no such conviction is present in this case.

Taxpayer's fourth argument must be rejected for two reasons. First, the drug tax may attach as a result of illegal conduct which is broader than holding or possession. Second, illegal conduct is illegal whether or not the person engaging in the conduct is arrested, prosecuted and/or convicted in a criminal prosecution, or even whether or not the illegal conduct is ever discovered. Taxpayer next argues K.S.A. 79-5201 et seq. is unconstitutional as it is in violation of the Fourteenth Amendment of the United States Constitution in that it denies the Taxpayer equal protection of the laws.

Consideration of Constitutional questions is beyond the scope of these proceedings. In a proceeding before an administrative body such as this tribunal, all of the state statutes are presumed constitutional and valid. Felton Truck Line V. State Board of Tax Appeals. 183 Kan. 287, 293 (1958). This tribunal is without authority to overturn this presumption. As a result, Taxpayer's fifth argument is rejected.

Taxpayer nest argues K.S.A. 79-5201 et seq. is unconstitutional as vague and ambiguous.

As noted above. Constitutional questions arc beyond the scope of these proceedings. As a result, Taxpayer's sixth argument is rejected.

Taxpayer next argues K.S.A. 79-5201 et seq. is unconstitutional as it is in violation of the Fifth Amendment to the United States Constitution.

As noted above, Constitutional questions are beyond the scope of these proceedings. As a result, Taxpayer's seventh argument is rejected.

Taxpayer next argues the Department's assessment is arbitrary and capricious.

Taxpayers eighth argument is rejected as being

unfounded.

Taxpayer next, and finally. argues the assessment of the drug tax is prohibited by double jeopardy. res judicata and collateral estoppel. In regard to the issue of double jeopardy, Taxpayer argues that in order for the drug tax to attach, there must be a determination that the drugs in question were illegally held or possessed which implies some type of criminal conduct. Since Taxpayer would be subject to sanctions for the underlying criminal conduct, the fact that he could also be subject to criminal sanctions for violation of the drug tax act results in double jeopardy, i.e. he could be convicted twice of the same criminal conduct.

In regard to the issues of res judicata and collateral estoppel, Taxpayer argues that the outcome of his criminal case is binding on the Department of Revenue. Taxpayer asserts the Department of Revenue should be collaterally estopped from denying that Taxpayer did not criminally possess a controlled substance since he was convicted of only attempted possession. By implication. Taxpayer renews his argument that a finding of criminal possession is necessary before the drug tax will attach.

Taxpayers ninth, and final argument must also be rejected. First, Taxpayer's argument regarding double jeopardy relates to the constitutionality of the drug tax. As noted above. Constitutional questions are beyond the scope of these proceedings. As a result. Taxpayer's argument regarding double taxation is rejected.

Second, Taxpayer's argument concerning res judicata and collateral estoppel is without merit.

The matter is not barred by res judicata because the cause of action is not the same.

The rule of collateral estoppel is generally con-

sidered to be an aspect of the broader principal of res judicata. In essence, collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment. that issue cannot again be litigated between the same parties in a future lawsuit. In order for the doctrine of collateral estoppel to apply, both the issues and the parties involved in subsequent litigation must be essentially the same. In In re Estate of Beason, 248 Kan. 803, Syl ¶6.___ P.2d __ (1991). the Court noted that:

> Collateral estoppel prevents a second litigation of the same issues between parties or their privies. Collateral estoppel requires: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment: (2) the panics must be the same or in privity, and; (3) the issue litigated must have been determined and necessary to support the judgment.

In this case, it does not appear the requirement's of Beason have been met. First, the Journal Entry of Taxpayer's criminal conviction indicates Taxpayer entered a plea of nolo contendere which was probably the result of a plea agreement. As such, the criminal court never ruled on the merits of the case.

Second, the issues involved in this proceeding and the criminal proceeding are not identical. Note for example that:

(a) The prosecution for possession of a controlled substance without a tax stamp contrary to K.S.A. 79-5208 is criminal. The imposition of tax is civil.

(b) The standard of proof in the criminal case is beyond a reasonable doubt; in the tax matter the valid-

ity and correctness of the assessment is presumed. [See K.S.A. 79-1505(c).]

(c) in the criminal prosecution the State has the burden of proof. in the tax matter. the burden is on the Taxpayer to show the incorrectness or invalidity of the tax and penalties assessed. [See K.S.A. 79-1505(c).]

(d) The Department of Revenue has no control over the issues addressed in a criminal case by the State's attorney. The State's attorney has no control over the issues addressed by' the Department of Revenue in regard to matters of taxation.

Third, the parties are neither the same nor in privity. The Kansas Court of Appeals in State v. Parson. 15 Kan. App. 2d 374 (1991) did hold the various agencies of the State of Kansas are in privity with the various county prosecutors such that a prior disposition of a case involving the same issue adverse to an agency would be binding on the prosecutor in a criminal case on the same issue. The Court very carefully noted, however, that the reverse situation is not the case, given the differences in the burden of proof.

HAVING EXAMINED and rejected all of Taxpayer's arguments, all that is left to consider is the motion for summary judgment or a directed verdict raised by the Department of Revenue at the formal hearing.

K.S.A. 79-5201 et seq. creates a rebuttable presumption that the tax and penalties assessed by the Department of Revenue for possession of marijuana or controlled substances to which the proper drug tax stamps have not been affixed are valid and correctly determined and assessed.

K.S.A. 79-5205(c) places the burden of showing the invalidity or incorrectness of the Department's assessment upon the Taxpayer.

The standard by which an attempt to overcome

the presumption found in K.S.A. 79-5205(c) is to be measured is "by a preponderance of the evidence." This standard is well known at law, and has been used as a standard in many contexts and for a considerable period of time. It is, therefore, unnecessary to define or discuss it here.

In this case, Taxpayer did not present any testimony or evidence (other than the document's previously mentioned), choosing instead to base his case on legal arguments. As a consequence, when Taxpayer's legal arguments fail there is no basis for finding Taxpayer has carried his burden of proof. As a result, the Department's Motion for a finding that Taxpayer has failed to overcome the statutory presumption of the correctness and validity of the Department's assessment by a preponderance of the evidence must be granted.

THEREFORE the Designee of the Director of Taxation finds that the Department of Revenue's assessment of July 15, 1988. should be upheld in all respects.

BOTH PARTIES ARE HEREBY ADVISED of the right to petition the Director of Taxation for review of this order, in accordance with K.S.A. 77-526 and 77-527. Such petition for review must be filed with the Director of Taxation within fifteen (15) days after service of this order and shall state the basis for review.

BOTH PARTIES ARE FURTHER ADVISED that, pursuant to K.S.A. 77-530, this Initial Order shall become effective and shall become a Final Order thirty (30) days after service. without further notice, unless reviewed in accordance with K.S.A. 77-527. as amended.

BOTH PARTIES ARE FURTHER ADVISED that a final order of the Director of Taxation may be appealed to the State Board of Tax Appeals, pursuant to K.S.A. 74-2438, by filing notice of appeal with the

secretary of the Board within 30 days of the date of the order and serving a copy of such appeal upon the Director of Taxation.

IT IS SO ORDERED.
Dated at Topeka, Kansas this 15th of September. 1992.

/s/

Jim Weisgerber, Designee of the Director of Taxation Kansas Department of Revenue Docking State Office Building Topeka, Kansas 66625-0001 (913) 296-3044

CERTIFICATE OF SERVICE

In accordance with the provisions of K.S.A. 77-526 and 77-531, as amended, I hereby' certify that a copy' of the above and foregoing Final Order was, on the 15th day of September, 1992, delivered to the principal place of business of:

Alisa M. Dotson
Director of Taxation
Division of Taxation
Kansas Department of Revenue
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-3044

Brian Cox
Attorney at Law
Legal Services Bureau
Kansas Department of Revenue
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-2381

In accordance with the provisions of K.S.A. 77-531, as amended, I hereby certify that a copy' of the above and foregoing Final Order was, on the 15th day of September . 1992, deposited in the United States Mail, postage prepaid and properly addressed to:

Robert L. Foster. II
1419 Haven Lane
Olathe, KS 66062

Richard W. Parker
Attorney at Law
Executive CentreIII
10901 Lowell, Suite 120
Overland Park. KS 66210

/s/

Jim Weisgerber, Designee of the
Director of Taxation

K.S.A. 79-5205 (C) The tax and penalties assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is upon the taxpayer to show their incorrectness or invalidity. Any statement filed by the director of taxation with the court or any other certificate by the director of taxation of the amount of tax and penalties determined or assessed is admissible in evidence and is prima facie evidence of the facts it contains.

Kansas Supreme Court Rule 9.03 (b) Tax Appeal Cases

The statutory bond shall accompany the notice of appeal and be filed with the clerk of the appellate courts. Unless otherwise requested, the bond shall be in the amount of 125% of the tax assessed and shall be approved by the clerk. If a bond in a lesser amount is requested, the appellant shall submit a motion pursuant to Rule 5.01 with the notice of appeal in lieu of the bond. The appropriate bond shall thereafter be filed within 10 days of the entry of the order granting or denying the motion.

Supreme Court, U.S.
FILED
APR 18 1996
CLERK

(3)

Docket No. 95-1489

In The
Supreme Court of the United States
1995 October Term

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MARK DEAN GODDARD,
*Petitioner,*

v.

KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,
*Respondent.*

---

# ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT

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# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENT KANSAS DEPARTMENT OF REVENUE

---

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**Docket No. 95-1489**

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**1995 OCTOBER TERM**

---

MARK DEAN GODDARD,

*Petitioner,*

v.

KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,

*Respondent.*

---

**ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT**

---

# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENT KANSAS DEPARTMENT OF REVENUE

---

## SUPPLEMENTAL NATURE OF THE CASE

This civil, administrative tax case involves the petitioner's [1] constitutional attack on a Kansas statute requir-

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[1] Some of the quotations in the body of this brief refer to multiple petitioners. Only the present petitioner remains in the case at this point.

ing the posting of an appeal bond before the Kansas appellate courts will review an administrative determination upholding the assessment of drug tax. The petitioner's initial Petition for Certiorari was returned to petitioner's attorney due to various printing and other errors. The petitioner has now filed an amended Petition for Certiorari, and the case has been docketed.

In his amended Petition for Certiorari, the petitioner provides a correct "Statement of the Case" as far as it goes. Because it is not complete, however, respondent Kansas Department of Revenue adds the following: The petitioner's April 7, 1995, "Motion for Waiver of Bond" filed in the Kansas Court of Appeals stated that "it is impossible for the taxpayers to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals." Respondent's Appendix at 1. The petitioner went on to allege in that motion that "denying the taxpayers the right to appeal the constitutionality of the statute merely because of the inability of the taxpayers to post the bond would be prejudicial, constitute irreversible harm, and is a perfect example of a true miscarriage of justice." *Id.* at 2. Petitioner suggested that the Court accept as sufficient bond approximately $10,000 already seized from him. *Id.* The Kansas Court of Appeals initially denied that motion "on present showing." Petitioner's amended Appendix at A-5 (Kansas Court of Appeals' "Order" of May 5, 1995). That order also, however, permitted both parties to "address the issue of an appropriate bond by written responses." *Id.*

Petitioner responded that "[g]iven appellants' occupations, they are unable to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals," and that "[r]equiring appellants to pay over a million dollars in order for an opportunity to prove their inno-

cence would deprive these taxpayers of the due process of law to which they are entitled under both the Kansas and the United States Constitutions." Respondent's Appendix at A-7, 8 ("Suggestions in Support of Appellants' Motion to Waive Bond"). He then suggested that the Court accept as sufficient bond the approximately $10,000 already seized from them, or that the Court waive the bond entirely. *Id.* at A-8 ("Suggestions in Support of Appellants' Motion to Waive Bond"). The Court of Appeals denied the motion, stating "Motion to waive bond denied. Appellant's [sic] have 10 days to file the required bond." Petitioner's amended Appendix at A-4 (Court of Appeals' order of June 26, 1995). No bond was ever filed.

The Court of Appeals then issued its "Order" of July 24, 1995, stating that "In the absence of a response to this court's order dated June 26, 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b)." *Id.* at A-3. The petitioner then filed his "Appellant's [sic] Motion for Rehearing and Modification" alleging again that he was "financially unable to post the required bond," Respondent's Appendix at A-14, and that "should the Court dismiss the instant appeal, Appellants will be denied the due process of law to which they are entitled under both the Kansas and the United States Constitutions as the only way they may seek judicial review of the subject tax assessment is by appeal to this Court," *id.* ("Appellants' Motion for Rehearing and Modification"). He also offered an additional $5,000 in bond. *Id.* at A-14, 15. The Court of Appeals denied the motion for rehearing without elaboration by its order of August 14, 1995. Petitioner's amended Appendix at A-2.

The petitioner then filed a petition for discretionary review with the Kansas Supreme Court in which he made the

same allegations as above, adding that "They are being denied due process and equal protection of the law as guaranteed by the Kansas Constitution and the U.S. Constitution." Respondent's Appendix at A-29. He then suggested that the approximately $10,000 previously seized serve as a bond, or that $5,000 be considered a sufficient bond. *Id.* at A-30. The Kansas Supreme Court denied the petition for review without elaboration by its order of September 26, 1995. Amended Appendix at A-1.

At no time in the Courts below did the petitioner offer legal authority, case law or secondary authority, in support of his claim, not did he suggest to those Courts the need for any briefing on the constitutional issue presented by him here, *i.e.* the constitutionality of Kansas' appeal bond statute.

## ARGUMENT

### I. THE PETITIONER'S ARGUMENT

The sole argument petitioner makes in his Petition for Certiorari is that "It is a denial of due process and of equal protection of the laws to require the taxpayers [sic] to post a bond in the amount of 125% of the tax assessed when they [sic] are challenging the constitutionality of the statute which assesses the tax and at the same time, the statute they are challenging presumes the tax to be accurate and places the burden of proof upon the tax payers [sic] to show the tax inaccurate." Petition for Certiorari at 5. The petitioner offers the Court no legal authority, case law or secondary authority, in support of his claim. Significantly, the petitioner makes no argument in his Petition that the assessment of the tax violates the Double Jeopardy Clause, and such issue was not addressed in this case at anytime by the Kansas courts below. As such, there is nothing for respondent to address concerning any such claim. Nor does the petitioner allege indigency.

## II. PETITIONER OFFERS NONE OF THE REASONS FOR THE GRANT OF CERTIORARI CONTAINED IN SUP. CT. R. 10.1

Petitioner's one (1) paragraph argument on the issue as presented offers this Court none of the reasons for granting a petition for certiorari detailed in this Court's Rule 10.1, specifically (b) and (c). Although respondent recognizes that the Court is expressly not bound by the factors detailed in that Rule, the petitioner has also not offered the Court any *other* reasons for granting his petition for certiorari. Nor does he offer the Court citation to case law or secondary authorities supporting his constitutional claim. The most that petitioner has offered the Court is the bald conclusion that Kansas' tax appeal bond statute is unconstitutional. This is not "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ" required by this Court's Rule 14.1(h).

## III. PETITIONER DID NOT ADEQUATELY FRAME THE ISSUE IN THE STATE COURTS BELOW

Further, petitioner did not adequately frame in the Kansas courts below the constitutional issue now argued by him. This Court has held that it will generally not decide federal claims not "pressed or passed upon" below. *E.g., Clark v. Jeter*, 486 U.S. 456, 459-60 (1988)(relying on *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 [1988]). Similarly, this Court's Rule 14.1(g)(i) requires that the petitioner must detail "when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . . ."

In an apparent attempt to comply with these requirements, petitioner alleges that "The due process and equal

protection constitutional questions were raised at every step of the appellate process from the initial appeal within the State of Kansas Department of Revenue through the petition to the Supreme Court of the State of Kansas. The issues were raised in writing in the briefs to each of the entities upon the question." Petition at 4.

This statement is not only incomplete but inaccurate. For example, the petitioner failed to include in his appendix any record of the arguments presented by him on this issue to the Kansas Supreme Court. Further, the petitioner apparently confuses the statutory appeal bond issue pressed by him in this Court with the Double Jeopardy issue pressed by him below but not in this Court. Clearly, the appeal bond issue is raised in a conclusory fashion here, just as it was raised in a somewhat more conclusory fashion in the Kansas courts below; such issue was not, however, raised administratively, as petitioner alleges, because the appeal bond issue simply did not present itself until petitioner appealed to the Kansas Court of Appeals. Further, it does not appear that the petitioner raised his Equal Protection argument until he sought discretionary review in the Kansas Supreme Court. Just as clearly, the petitioner did raise the Double Jeopardy issue administratively, but clearly did not in the Kansas courts below, and certainly does not here. Nor has the petitioner provided to this Court any evidence of "the way in which [the issue] w[as] passed on by those courts . . . .]," Rule 14.1(g)(i), above. As such, respondent respectfully submits that the petitioner has not brought up a record for this Court affirmatively establishing that he pressed the issue below and that it was in fact passed on by the Kansas courts.

## IV. THE ORDERS BY THE KANSAS COURT OF APPEALS AND SUPREME COURT DID NOT DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW

### *A. PETITIONER NEITHER SOUGHT NOR RECEIVED ANY RULING BELOW ON THE CONSTITUTIONAL ISSUE*

As noted above, the constitutionality of Kansas' statutory appeal bond was never addressed by the Kansas appellate courts. The fault for this omission rests squarely with petitioner who, for all his appellate submissions in the Kansas courts reveal, made virtually no effort to secure a ruling on the issue before moving on to the next level. Certainly, none of the potential underlying legal issues present concerning the penultimate issue of the constitutionality of Kansas' statutory appeal bond, some of which are discussed § V, below, was presented by the petitioner to the Kansas appellate courts. As noted above, the petitioner offered those courts no legal authority, case law or secondary authority, in support of his claim, nor did he suggest to those courts the need for any briefing on the constitutional issue presented by him in the case. As a result, it is not surprising that the Kansas appellate courts did not address the issue.

### *B. THE FACTUAL RECORD IS NOT FULLY DEVELOPED*

Nor is the factual record which might be relevant to the petitioner's constitutional argument fully developed in this case. For example, how much appeal bond would have been acceptable in this case? What types of appeal bonds have the Kansas appellate courts required in the past in tax cases pursuant to K.S.A. 74-2426(d), (e), and Kan. Sup. Ct. R. 9.03(b)?

Further, how does such history compare with the appeal bond required in general civil litigation, K.S.A. 60-2103(d)? In addition, what other efforts have been made by the petitioner to secure a ruling on his Double Jeopardy issue in other forums (discussed § V[A], below)? These and numerous other fact matters relevant to the legal issue remain shrouded in the shadow of the spare record which exists in this case. Petitioner bears sole responsibility for this state of the record.

### *C. NO CLAIM IS MADE THAT THIS CASE WILL AFFECT ANYONE OTHER THAN PETITIONER*

Certainly important for this Court's grant or denial of his petition for certiorari is that petitioner makes no claim that resolution of the issue presented will affect anyone other than him. The factual record explains why. In his Petition, the petitioner fails to note that the Kansas Court of Appeals initially denied his motion to waive the statutory appeal bond "on present showing." Petitioner's amended Appendix at A-5 (Kansas Court of Appeals' "Order" of May 5, 1995). That order also, however, permitted both parties to "address the issue of an appropriate bond by written responses." *Id.* Petitioner took an all-or-nothing attitude: he suggested that the Court accept as sufficient bond approximately $10,000 already seized from him, or that the Court waive the bond entirely. Respondent's Appendix at A-8 ("Suggestions in Support of Appellants' Motion to Waive Bond"); A-2 ("Motion for Waiver of Bond"). He also failed to offer the Court some reasonable, middle ground. It was not until after the Court ruled against him that he offered an additional $5,000 in bond. Respondent's Appendix at A-14 ("Appellants' Motion for Rehearing and Modification").

As evidenced by its order just referred to, the Kansas Court of Appeals is of the opinion that, in an appropriate case,

and upon a sufficient showing, a reduction in appeal bond will be permitted. Such is Kansas law. K.S.A. 74-2426(d), (e); Kan. Sup. Ct. R. 9.03(b). As such, this case is not a case of an alleged unconstitutional enforcement of a 125% appeal bond. Rather, this case involves simply the petitioner's failure to convince either the Kansas Court of Appeals or the Kansas Supreme Court (in his application to that Court for discretionary review) that he made a sufficient showing in support of his request for reduction of the bond. Respondent respectfully submits that such failure in his burden of proof raises a non-constitutional issue of importance to no one other than to the present petitioner.

In addition, the petitioner has failed to completely advise this Court precisely what he was required to do in proceedings below concerning the appeal bond. For example, he fails to allege in this Court, just as he failed to allege in the Kansas appellate courts below, that he pursued any alternatives to the posting of the entire amount of the bond. He alleges no attempt by him to raise the necessary bond, or some part thereof, through a private surety which might provide the appeal bond for a percentage on the dollar, and there is no factual record on this point. Further, it is not a bond in the amount of 125% of the tax *and penalty* which must be produced, rather, it is 125% of the *tax*. K.S.A. 74-2426(d); Kan. Sup. Ct. R. 9.03(b). The $1,144,460.00 figure quoted by petitioner in his Petition is tax *and a 100% penalty*. Finally, as the petitioner's Statement of the Case reflects, this case has been litigated since 1988, the petitioner at no time showing any signs of giving up. Petitioner alleges no reason for his failure over the last eight (8) years to prepare for the need to post an appeal bond.

Petitioner addresses none of these considerations in his Petition. As such, the limited scope of the issue presented in

this case will likely not impact any other litigant, and is not grounds for certiorari.

## V. THE ORDERS BY THE KANSAS COURT OF APPEALS AND SUPREME COURT DO NOT CONFLICT WITH DECISIONS OF THIS COURT, WITH DECISIONS OF OTHER STATE COURTS, OR WITH DECISIONS OF UNITED STATES COURTS OF APPEAL

### *A. IN THE AREAS OF TAXATION, STATES MAY REQUIRE PAYMENT FIRST, AND PROVIDE PROCESS SECOND*

Petitioner fails to acknowledge that the area of taxation, as here, is of special concern; states may require tax payments first, then provide process to adjudicate liability and lawfulness. In *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), for example, this Court considered the action by a taxpayer seeking a declaration that a Florida taxing scheme was unconstitutional and a refund of taxes paid thereunder. The Florida Supreme Court granted the first, but denied the second, request. Although this Court held that Florida must provide the taxpayer some form of backward-looking relief, it noted:

> [I]t is well established that a State need not provide pre-deprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we

> have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

496 U.S. at 37. The Court expressed no objection to Florida's scheme "designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved [emphasis original]." *Id.* at 38.

Further, in *California v. Grace Brethren Church*, 457 U.S. 393 (1982), this Court considered whether taxpayers challenging unemployment insurance taxes on constitutional grounds had a plain, speedy, and efficient remedy under state law such as to bar their federal suit pursuant to the anti-injunction act. This Court reiterated that "a state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax'" *Id.* at 411. The Court fully examined California procedures, holding sufficient the taxpayers' right to request a refund of the tax, then if denied, sue in superior court where their constitutional claim could be raised. *Id.* at 413-18. This Court noted that "California taxpayers cannot raise their constitutional challenges in the administrative tax refund proceeding unless an appellate court has already sustained such a challenge." *Id.* at 413, n.30. *See also Nat'l Private Truck Council Inc. v. Okl. Tax Comm'n*, ___ U.S. ___, 132 L. Ed. 2d 509 (1995); *Harper v. Virginia Dept. of Taxation*, ___U.S. ___, 125 L. Ed. 2d 74, 84 (1995).

Kansas' appeal bond operates no more than to require payment of the tax (plus 25% presumably to cover any penalty and accruing interest), or such lesser amount as the Court

requires, prior to providing the taxpayer access to final appellate remedies. The bond is expressly designed to ensure the taxpayer's "prosecution of the review without delay and payment of all costs assessed against the petitioner." K.S.A. 74-2426(d). Consistently with the logic of the cases cited, such scheme is constitutional. Petitioner makes no claim that his appeal bond would not have been promptly returned to him *in full* had he been successful in his appeal.

### *B. EQUAL PROTECTION*

Petitioner's Equal Protection claim is devoid of any legal analysis. He fails to advise the Court of what class he is a member which has been discriminated against, and he fails to advise the Court of the appropriate level of scrutiny for any such class. Further, the petitioner fails to acknowledge that persons *similarly situated* under Kansas law, *i.e.*, taxpayers appealing Board of Tax Appeals' decisions, are presumptively treated in precisely the same fashion: the appeal bond is required in all cases unless by the Court waived or lowered. K.S.A. 74-2426(d), (e); Kan. Sup. Ct. R. 9.03(b). There is much legislative wisdom in this requirement.

Taxpayers failing to pay their rightful due are an exceptional category for, without the payment of taxes (income, sales, severance, drug, or whatever) the ship of State sinks. In the past, this Court has recognized the importance of government's collection of revenues. *E.g.*, *McKesson*, above; *Commissioner v. Shapiro*, 424 U.S. 614, 631 n.12 (1976). Petitioner makes no claim to the contrary in his Petition.

Further, Kansas law requires an appeal bond for non-tax litigants to stay enforcement of judgments in such amount "as the [district] court requires." K.S.A. 60-2103(d). As such, there has been no singling out of the present petitioner for special treatment. *See generally Christopher LaSalle and Co.*

*v. Heller Financial*, 731 F. Supp. 279, 287-88 (N.D. Ill. 1990) (holding state supercedeas bond provision making no distinction among litigants not violative of Equal Protection Clause). Petitioner makes no claim to the contrary in his Petition.

In addition, because the petitioner might have pursued other avenues to gain review of his Double Jeopardy issue, any alleged roadblock to review created by the appeal bond is simply not an unconstitutional one. In *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450 (1988), involving an Equal Protection challenge against North Dakota's charging a user school bus fee in certain districts but not elsewhere, this Court considered the availability to the plaintiffs of alternative methods of transportation. This Court distinguished the precedents cited by the plaintiffs, explaining that:

> [E]ach [case cited by the plaintiffs] involved a rule that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process. Decisions invalidating such rules are inapposite here. In contrast to the 'utter exclusiveness of court access and court remedy,' [citation omitted], North Dakota does not maintain a legal or a practical monopoly on the means of transporting children to school. Thus, unlike the complaining parties in all the cases cited by appellants, the Kadrmas family could and did find a private alternative to the public school bus service for which Dickinson charged a fee.

487 U.S. at 460-61. As such, and for other reasons as well, this Court determined that there was no Equal Protection violation. *See also U.S. v. Kras*, 409 U.S. 434, 445-46 (1973) (bankruptcy filing fee upheld against an Equal Protection challenge by indigent; court determined debtor had other means available for same relief); *Bodie v. Connecticut*, 401

U.S. 371 (1971)(filing fee for divorce action held violative of Due Process in challenge by indigents; court determined no other means to terminate marital relation existed).

Although Kansas' appeal bond requirement obviously exists in administrative *tax* appeals under Kansas law, the same bond requirement does not exist in other types of proceedings in which the petitioner might have sought to challenge the constitutionality of Kansas' drug tax. For example, in *State v. Gulledge*, 257 Kan. 915, 896 P.2d 378 (1995), the Kansas Supreme Court considered and decided the constitutionality of Kansas' drug tax in a criminal case. There is no bond requirement in Kansas criminal cases.

Further, this Court considered a challenge to the constitutionality as applied of Montana's drug tax statute in a bankruptcy appeal. *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994).[2] The undersigned understands that one of the petitioners in the initial Petition for Certiorari filed a bankruptcy case the filing of which case punctuates the point made here. The undersigned is unaware of any bond requirement in bankruptcy cases. The filing fee for a bankruptcy case, is of course, valid. *Kras*, above, 409 U.S. 434.

In addition, petitioner could have attempted to invoke equitable remedies under Kansas law. *E.g.*, K.S.A. 60-801 *et seq.*, mandamus; K.S.A. 60-901 *et seq.*, injunction; or K.S.A. 60-1701 *et seq.*, declaratory judgment. Only the injunction statutes have a bond requirement but such is limited to damages and attorney's fees incurred because of wrongful injunction and may be waived. K.S.A. 60-905(b). Although the

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[2] As noted above, the petitioner does not raise the Double Jeopardy issue in his Petition.

precise extent to which a taxpayer may resort to such remedies has not fully been determined in Kansas, relief may be available in some circumstances. *E.g., Barker v. State,* 249 Kan. 186, 815 P.2d 46 (1991), *rev'd,* 503 U.S. 594 (1992) (court entertained class action challenging constitutionality of Kansas' income tax act). *See also First Page, Inc. v. Cunningham,* 252 Kan. 593, 595, 847 P.2d 1238 (1993); *Dean v. State,* 250 Kan. 417, 427, 826 P.2d 1372 (1992); *Zarda v. State,* 250 Kan. 364, 371, 374, 826 P.2d 1365, *cert. denied,* 112 S. Ct. 2941 (1992).

The petitioner should have the burden of proving that these alternative remedies are unavailable or inadequate. *E.g., Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 14-16 (1987)(abstention doctrine considered; petitioner for federal relief held to have burden of proving that State procedures to adjudicate its constitutional claims were inadequate). Although some such proceedings would very likely now be time-barred under Kansas law due to the statute of limitations, or otherwise, the fact that such proceedings existed at the time that the petitioner thought that he had a Double Jeopardy challenge vitiates any claim by him that he has not had the freedom of access to a court with the power to address such claim. The petitioner makes no claim that he was led to believe that he was required to proceed *solely* pursuant to the administrative process. The petitioner has failed to analyze this consideration in his Petition for Certiorari.

One of the cases distinguished by this Court in *Kadrmas,* above, was *Lindsey v. Normet,* 405 U.S. 56 (1972), holding violative of the Equal Protection Clause an Oregon law requiring tenants in landlord/tenant disputes to post a double appeal bond to appeal forcible entry and detainer decisions. In addition to the availability of alternative remedies in the case at bar, however, additional reasons distinguish the stat-

utes in issue in *Lindsey* from Kansas' appeal bond statute. Initially, Oregon tenants seeking to appeal such decisions were required to post not only the double bond required in such actions, but also the undertaking required of general appellants. *Id.* at 74-76. Further, the double bond requirement was "unrelated to actual rent accrued or to specific damage sustained by the landlord." *Id.* at 77. This Court concluded that, "in the case before us, however, the State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment. Instead, it has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action." *Id.* at 78-79. An appellant from a Board of Tax Appeals' decision is not, however, subject in Kansas to any multiple bond requirement, nor is the appeal bond unrelated to the amount of tax, penalty, and interest in issue. *See also Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988)(upholding against Equal Protection challenge Mississippi's 15% penalty on unsuccessful appellants).

The petitioner's Equal Protection argument fails.

### *C. DUE PROCESS*

Petitioner's Due Process claim is similarly devoid of analysis of any kind. Petitioner states at most that "no judicial authority can review the [drug tax] statute until such time as they have posted a bond in the amount of 125% of the tax." Petition for Certiorari at 5. As noted above, however, due process concerns are different in the tax arena given the importance of the state's interests involved; payment first, then process, is permissible.

Further, the petitioner's opportunity to fully address the constitutional issue in the Kansas appellate courts below in moving to waive or lower the appeal bond fully satisfies the

Due Process Clause. *Christopher LaSalle,* above, 731 F.Supp. at 288-89. The district court there noted:

> It must be concluded as a matter of law that Christopher was afforded all the process that it was due. After all, both in theory and in fact, Christopher had the full opportunity to marshal all its arguments—constitutional and otherwise—against conditioning its right to a stay on the posting of such a large bond. It simply failed to convince the reviewing court that its position merited relief. Surely there is no reason to believe that the Illinois Appellate Court shirked its responsibility to safeguard the constitutional rights of any litigant in considering that motion—and if Christopher believed otherwise, it had the right to seek review of *that* decision [emphasis original; footnotes omitted].

*Id.* at 289.

*Lindsey,* above, also supports respondent's position in this case. There, this Court reiterated that "Due process requires that there be an opportunity to present every available defense." *Lindsey,* 405 U.S. at 66. Although Oregon law barred assertion by the tenant in an FED action of all his potential defenses, *id.* at 65-66, this Court held sufficient the tenant's right to raise such issues in other actions, *id.* at 66-69. Respondent has sketched out, above, the other proceedings potentially available to petitioner for assertion of his constitutional claim.

The petitioner's Due Process argument also fails.

## CONCLUSION

Respondent respectfully requests the Court deny the Petition for Certiorari.

Respectfully submitted,

Richard E. Oxandale,
General Counsel
Kansas Department of Revenue

Joseph Brian Cox, Attorney
Kansas Department of Revenue
Legal Services Bureau
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-2381
*Counsel of Record for Respondent*
*Kansas Department of Revenue*

(4)

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

**Docket No. 95-1489**

**In The**
**Supreme Court of the United States**
**1995 October Term**

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**MARK DEAN GODDARD,**

***Petitioner,***

**v.**

**KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,**

***Respondent.***

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# ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT

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# RESPONDENT'S APPENDIX

BY RESPONDENT KANSAS DEPARTMENT OF REVENUE

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Richard E. Oxandale,
General Counsel
Kansas Department of Revenue

Joseph Brian Cox, Attorney
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Topeka, Kansas 66612-1588
(913) 296-2381
***Counsel of Record for Respondent Kansas Department of Revenue***

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36 pp

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD FROM AN
ORDER OF THE DIRECTOR OF
TAXATION ON ASSESSMENT Doc. No. 92-16575-DT
OF MARIJUANA AND CONTROLLED
SUBSTANCES ATTACKS.

AND

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER FROM AN
ORDER OF THE DIRECTOR OF
TAXATION ON ASSESSMENT Doc. No. 92-16576-DT
OF MARIJUANA AND CONTROLLED
SUBSTANCES TAX.

**MOTION FOR WAIVER OF BOND**

COME NOW, the above referenced taxpayers, by and through their attorney, Richard W. Parker, and move the Court of Appeals for an Order waiving the requirement of bond pursuant to Supreme Court Rule 9.03(b) and in support thereof, states and alleges as follows:

1. That the Department of Revenue assessed against each of the taxpayers named herein a tax based upon K.S.A. 79-5201, et. seq., Marijuana and Controlled Substances, in the amount of $1,144,460.00.

2. That pursuant to Supreme Court Rule 9.03(b), the required bond is to be in the amount of 125% of the tax.

3. That it is impossible for the taxpayers to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals.

4. That the Department of Revenue has previously seized just over $10,000.00 from taxpayers shortly after the assessment.

5. That the taxpayers would request that the $10,000.00 in the possession of the Department of Revenue serve as the bond necessary for purposes of appealing the tax assessment.

6. That this appeal is based upon the constitutionality of the Controlled Substances Tax Act.

7. That the Board of Tax Appeals does not have the authority to rule on constitutional issues.

8. That denying the taxpayers the right to appeal the constitutionality of the statute merely because of the taxpayers inability to post the bond would be prejudicial, constitute irreversible harm, and is a perfect example of a true miscarriage of justice.

WHEREFORE, the taxpayers move for an Order from the Court of Appeals waiving bond in this appeal and for such other relief as the Court may deem to be just and equitable.

RICHARD W. PARKER, P.A.

By: /s/_____

Richard W. Parker—#10470
7600 W. 110th St., Ste. 104
Overland Park, KS 66210
913-451-1980
ATTORNEY FOR TAXPAYERS

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Motion for Waiver of Bond was served upon the following parties via U.S. Mail, postage prepaid, on this 7th day of April, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
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915 S.W. Harrison
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Brian Cox, Attorney
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Topeka, KS 66212

Carl Edwards, Attorney
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915 S.W. Harrison
4th Floor
Topeka, KS 66612

/s/
Richard W. Parker

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

**SUGGESTIONS IN SUPPORT OF APPELLANTS' MOTION TO WAIVE BOND**

**COME NOW** Appellants in the above entitled case, by and through counsel, Richard W. Parker, and pursuant to the courts orders of May 5, 1995, and May 18, 1995, tender the following suggestions in Support of Appellants' Motion to Waive Bond.

Procedural History

On March 21, 1988, Mark Goddard and Robert Foster pled nolo contendere to the charges of attempted possession of cocaine and sale of cocaine. On July 15, 1988, the Kansas Department of Revenue issued a "Notice of Assessment of Tax Upon Marijuana and a Controlled Substance" to Robert Foster in the total amount of $1,144,460.00. A like notice of assessment in an identical amount was issued by the Department of Revenue on September 29, 1988, to Mark Goddard.

The tax rate assessed upon the substances was $3.50 per gram on marijuana and $200.00 per gram of cocaine. The

alleged amount of the substances upon which the tax was assessed as against each taxpayer was 63.3 grams of marijuana and 2,859.2 grams of cocaine.

On April 23, 1992, a formal hearing was held by the Department of Revenue. On September 15, 1992, the Administrative Hearing Officer designated by the Director of Taxation, Jim Weisgerber, entered an Order denying the Appeal of the taxpayers and upholding the assessment of the department.

On October 12, 1992, the taxpayers filed a Notice of Appeal to the Board of Tax Appeals. On June 1, 1993, a prehearing conference was held, and on June 1, 1994, a Formal Hearing was conducted in the above-entitled matter before the Board of Tax Appeals. On January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the Department of Revenue. On February 20, 1995, the taxpayers filed a Petition for Reconsideration, which was denied by the Board of Tax Appeals in its Order Reconsidering the Board's prior Order of January 30, 1995. On April 7, 1995, the taxpayers filed their Notice of Appeal/Petition for Judicial Review in the Court of Appeals.

Waiver of Bond

The instant appeal is taken from the Board of Tax Appeals to this Court pursuant to K.S.A. 74-2426. Kansas Supreme Court Rule 9.03 (b) provides in pertinent part:

> The statutory bond shall accompany the notice of appeal and be filed with the clerk of the appellate courts. Unless otherwise requested, the bond shall be in the amount of 125% of the tax assessed and shall be approved by the clerk. If a bond in a lesser amount is requested, the appellant shall submit a motion pursuant to Rule 5.01 with the notice of appeal in lieu of the bond.

On April 7, 1995, pursuant to Supreme Court Rule 5.01, appellants filed a Motion for Waiver of Bond. On May 5, 1995, this Court denied Appellants' Motion and instructed the parties to address the issue of an appropriate bond by written response.

The instant appeal involves, in part, the constitutionality of the Marijuana and Controlled Substances Act, K.S.A. 79-5201 *et seq.* in view of the U.S. Supreme Courts recent decision in *Department of Revenue of Montana v. Kurth Ranch, et.al.*, 1994 W.L. 237615 (U.S.)

In *Kurth*, the Court struck down Montana's Dangerous Drug Tax on the grounds that the assessment was so excessive that it constituted a punitive "tax." Similarly, in the present matter, appellants contend that the Kansas Marijuana and Controlled Substance Act violates the 5th and 14th Amendments to the United States constitution, and under *Kurth*, supra, the assessment regimen under the Act is prohibited by double jeopardy, res judicata and collateral estoppel.

The Board of Tax Appeals determined that the *Kurth* decision, supra, was not applicable to the present matter, noting that the Board is specifically prohibited from ruling on constitutional issues as stated in *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836 (1958). The Board went on to note that should it decide to apply *Kurth*, it would have to find that Article 52, of Chapter 79 of the Kansas Statutes Annotated is unconstitutional, which under long-standing Kansas law, it is specifically prohibited from doing.

On January 30, 1995, the Board entered an Order denying the taxpayers' appeals, and on March 6, 1995, denied the taxpayers' Petition for Reconsideration. Pursuant to K.S.A. 74-2426, Appellants perfected the instant appeal from the excise tax assessment by the Department of Revenue.

Under Kansas law, the assessment of taxes, penalties and interest by the Director of Taxation is presumed to be correctly determined and assessed. K.S.A. 79-5205(c) provides, in pertinent part,

> The tax penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed. *The burden is upon the taxpayer to show their incorrectness or invalidity.* (Emphasis added).

Therefore, under K.S.A. 79-5205, the burden of proving that the assessment is invalid falls squarely on the shoulders of appellants.

As the Board of Tax Appeals is unable to determine the constitutionality of the Kansas Marijuana and Controlled Substances Act, under K.S.A. 79-504, in order to overcome the presumption of the validity of the assessment set forth in K.S.A. 79-5205, the taxpayers had to appeal the instant matter to this court.

As previously stated, under Kansas Supreme Court Rule 9.03 (b), in order to perfect an appeal, a bond in the amount of 125% of the tax assessed must be posted. In the present matter, the assessed tax is $1,144,460.00 for each appellant. Therefore, in order to appeal this matter, appellants are required to post a bond of $1,430,575.00. Appellant Robert Foster is employed as an over-the-road truck driver, and appellant Mark Dean Goddard, is employed as a building contractor. Given appellants' occupations, they are unable to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals.

Taking into consideration the fact that Appellants have the burden of proving that the assessment of the subject excise tax is invalid, and under Kansas law, an appeal of this

constitutional issue must be made to this court, requiring appellants to pay over $1.4 million to perfect this Appeal would be a denial of due process. Somewhat akin to criminal law, the presumption under K.S.A. 79-5205 (c) is one of guilty unless the taxpayer is able to prove innocence. Requiring appellants to pay over a million dollars in order for an opportunity to prove their innocence would deprive these taxpayers of the due process of law to which they are entitled under both the Kansas and the United States Constitutions. Denying Appellants the right to appeal the constitutionality of K.S.A. 79-5201 *et seq.* merely because of the taxpayers inability to post the bond would constitute irreversible harm.

Under Supreme Court Rule 9.03, this Court has discretion to modify the required bond. Balancing the extremely limited financial resources of Appellants and Appellants constitutional right to appeal, the Appellants respectfully request this Court to enter an order waiving bond in this appeal.

In the alternative Appellants respectfully request that the approximately $10,000.00 cash seized by the Department of Revenue from the taxpayers shortly before the subject assessment, serve as the bond necessary for purposes of appealing the tax assessment.

To do otherwise would serve only to deny the taxpayers the constitutionally guaranteed due process of law to which they are entitled, merely because of their financial restraints.

WHEREFORE, Appellants respectfully request this Court to enter an Order waiving bond in this appeal and for

such other and further relief as the Court deems just and equitable.

RICHARD W. PARKER, P.A.

By: /s/ FOR

Richard W. Parker—#10470
7600 W. 110th St., Ste. 104
Overland Park, KS 66210
913-451-1980
ATTORNEY FOR TAXPAYERS

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Suggestions in Support of Appellants Motion for Waiver of Bond was served upon the following parties by depositing same in the U.S. Mail, postage prepaid, on this 21st day of June, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
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/s/
Kerri S. Nelson

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

**APPELLANT'S MOTION FOR REHEARING AND MODIFICATION**

COME NOW Appellants, Mark Dean Goddard and Robert Lee Foster, by and through counsel, Richard W. Parker, pursuant to Supreme Court Rule 7.05, and hereby request the Court to modify its Order dated July 24, 1995, dismissing Appellants' appeal for failure to file the required bond, and in support thereof state and allege as follows:

1. That on March 21, 1988 Mark Goddard and Robert Foster plead nolo contendere to the charge of attempted possession of cocaine and sale of cocaine.
2. That on July 15, 1988, and September 29, 1988, respectively, the Kansas Department of Revenue issued a "Notice of Assessment of Tax Upon Marijuana and a Controlled Substance" to Robert Foster and Mark Goddard in the amount of $1,144,460.00
3. That on April 23, 1992, a formal hearing was held by the Department of Revenue, and on September 15, 1992,

the Administrative Hearing Officer designated by the Director of Taxation, Jim Weisgerber, entered an order denying the Appeal of the taxpayers and upholding the assessment of the department.

4. That on October 12, 1992, the taxpayers filed a Notice of Appeal to the Board of Tax Appeals.
5. That on June 1, 1993, a prehearing conference was held, and on June 1, 1994, a formal hearing was conducted before the Board of Tax Appeals.
6. That on January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the Department of Revenue.
7. That on February 20, 1995, the taxpayers filed a Petition for Reconsideration which was denied by the Board of Tax Appeals in its order Reconsidering the Board's prior order of January 30, 1995.
8. That on April 7, 1995, the taxpayers filed their Notice of Appeal/Petition for Judicial Review in the Court of Appeals as well as their Motion for Waiver of Bond.
9. That on May 5, 1995, this Court denied Appellants' Motion for Waiver of Bond and instructed the parties to address the issue of an appropriate bond by written response.
10. That pursuant to this Court's orders of May 5, 1995 and May 18, 1995, Appellants filed their Suggestions in Support of Appellants' Motion to Waive Bond on June 21, 1995.
11. That on June 26, 1995, this Court denied Appellants' Motion to Waive Bond.
12. That Kansas Supreme Court Rule 9.03(b) provides that a statutory bond in the amount of 125% of the tax assessed shall be filed with the Clerk of the Appellate Courts unless otherwise requested.

13. That in the present matter, under Rule 9.03(b), the bond required to be posted by Appellants is $1,430,575.00.
14. That on July 24, 1995, this Court dismissed the present Appeal on the grounds that Appellants' had failed to post the required bond of $1,430,575.00. (See this Court's Order of July 24, 1995, marked Exhibit "A", attached hereto and incorporated by reference as if fully set forth herein).
15. That the instant appeal involves, in part, the constitutionality of the Marijuana and Controlled Substances Act, K.S.A. 79-5201 *et. seq.*
16. That the United States Supreme Court recently found Montana's Dangerous Drug Tax to be unconstitutional on the grounds that the tax assessment was so excessive that it constituted a punitive tax. *Department of Revenue of Montana v. Kurth Ranch, et al.*, 1994 W.L. 237615 (U.S.).
17. That similarly, in the present matter, Appellants contend that the Kansas Marijuana and Controlled Substances Act is unconstitutional under essentially the same analysis applied by the Supreme Court in *Kurth*, supra.
18. That the instant appeal is taken pursuant to K.S.A. 74-2426 which provides that an appeal from the Board of Tax Appeals must be taken to the Court of Appeals.
19. That Appellants raised the above constitutional issue before the Board of Tax Appeals, and the Board determined that the *Kurth*, supra, decision was not applicable the present matter as the Board of Tax Appeals is specifically prohibited from ruling on constitutional issues as stated in *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836 (1958).
20. That K.S.A. 79-5205(c) provides that the tax penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed.

21. That due to the fact that the Board of Tax Appeals is unable to determine the constitutionality of the Kansas Marijuana and Controlled Substances Act in order to overcome the presumption of the validity of the assessment, under K.S.A. 74-2426, the taxpayers had to appeal the instant matter to this Court.
22. That Appellants are financially unable to post the required bond of $1,430,475.00. (See Affidavits of Appellant Mark Goddard and Robert Foster, attached hereto as Exhibits "B" and "C", and incorporated by reference as if fully set forth herein).
23. That under Supreme Court Rule 9.03, this Court has discretion to modify the required bond.
24. That should the Court dismiss the instant appeal, Appellants will be denied the due process of law to which they are entitled under both the Kansas and the United States Constitutions as the only way they may seek judicial review of the subject tax assessment is by appeal to this Court.
25. That Appellants should not be denied their right to appeal based solely upon their extremely limited financial resources.
26. That the Department of Revenue seized approximately $10,000.00 cash from Appellants shortly before the subject assessment.
27. That Appellants request that the above amount serve as the bond necessary for purposes of appealing the tax assessment.
28. That in the alternative, Appellants respectfully request the Court to enter an Order setting bond in this matter at $5,000.00.

WHEREFORE, Appellants respectfully request this Court to enter an Order waiving a bond in the amount of

$1,430,575.00 in this appeal, and enter an Order permitting the $10,000.00 cash seized by the Department of Revenue to serve as the necessary bond for the present appeal. In the alternative, Appellants respectfully request the Court to enter an Order setting bond in this matter at $5,000.00, and for such other and further relief as the Court may deem just and equitable.

Richard W. Parker, P.A.

By: /s/

Richard W. Parker—#10470
7600 W. 110th St., Ste. 104
Overland Park, KS 66210
(913) 451-1980
ATTORNEY FOR APPELLANTS

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Motion for Rehearing and Modification was served upon the following parties by depositing same in the U.S. Mail, postage prepaid, on this 2nd day of August, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
Docking State Office Building
915 S.W. Harrison
3rd Floor
Topeka, KS 66612

Brian Cox, Attorney
Legal Services Bureau
Kansas Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66612-1588

Mark Burghart
General Counsel
Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66212

Carl Edwards, Attorney
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

/s/
Richard W. Parker

EXHIBIT B

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

**AFFIDAVIT**

The undersigned, Mark Dean Goddard, being of full age and first duly sworn on oath, states and deposes:

1. That Affiant is an appellant in the above-entitled matter.
2. That Affiant is employed as a building contractor.
3. That Affiant is financially unable to post a bond in the amount of $1,430,575.00 in order to perfect the present appeal.
4. That Affiant respectfully requests this Court to modify its Order dated July 24, 1995, dismissing the instant appeal.
5. That shortly before the subject assessment, the Department of Revenue seized approximately $10,000.00 from Affiant.
6. That Affiant respectfully requests this Court to enter an Order allowing the $10,000.00 cash previously seized by

the Department of Revenue to serve as the appropriate bond in this matter, or in the alternative, to set bond in this matter at $5,000.00.

7. Further, Affiant saith not.

/s/
Mark Dean Goddard, Affiant

SUBSCRIBED AND SWORN to before me this 2 day of August, 1995.

/s/
Notary Public

My appointment expires:
5-18-98

EXHIBIT C

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-63903

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

**AFFIDAVIT**

The undersigned, Robert Lee Foster, being of full age and first duly sworn on oath, states and deposes:

1. That Affiant is an appellant in the above-entitled matter.
2. That Affiant is employed as a truck driver.
3. That Affiant is financially unable to post a bond in the amount of $1,430,575.00 in order to perfect the present appeal.
4. That Affiant respectfully requests this Court to modify its Order dated July 24, 1995, dismissing the instant appeal.
5. That shortly before the subject assessment, the Department of Revenue seized approximately $10,000.00 from Affiant.
6. That Affiant respectfully requests this Court to enter an Order allowing the $10,000.00 cash previously seized by

the Department of Revenue to serve as the appropriate bond in this matter, or in the alternative, to set bond in this matter at $5,000.00.

7. Further, Affiant saith not.

/s/_____

Robert Lee Foster, Affiant

SUBSCRIBED AND SWORN to before me this 1 day of August, 1995.

/s/_____

Notary Public

My appointment expires:
5-18-98

COURT OF APPEALS ORDER DISTRICT CASE NO.

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD FROM NO. 95-73903-A
AN ORDER OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA AND
CONTROLLED SUBSTANCES TAX
AND
IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER FROM AN
ORDER OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA AND
CONTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT

DATE: 07/24/95.

CAROL G. GREEN
CLERK

No. 95-73,903

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

*In the Matter of the Appeal of Mark Dean Goddard, et al.*

**O R D E R**

In the absence of a response to this court's order dated June 26, 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b).

DATED: July 24, 1995.

FOR THE COURT

/s/

EDWARD LARSON, Judge

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**
**NO. 95-73903**

---

**IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX**
**AND** **Doc. No. 95-73903**
**IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX**

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# *APPELLANT'S PETITION FOR REVIEW*

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**APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KANSAS**

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**RICHARD W. PARKER**
**KS Supreme Crt. $10470**
**7600 W. 110th St.**
**Suite 104**
**Overland Park, KS 66210**
**(913) 451-1980**

**Attorney for Appellants Mark Dean Goddard and Robert Lee Foster**

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

**IN THE MATTER OF THE APPEAL OF MARK DEAN GODDARD, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX**

**AND** **Doc. No. 95-73903**

**IN THE MATTER OF THE APPEAL OF ROBERT LEE FOSTER, FROM AN ORDER OF THE DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX**

**APPELLANTS' PETITION FOR REVIEW**

COME NOW Appellants, Mark Goddard and Robert Foster, through counsel, Richard W. Parker, pursuant to Supreme Court Rule 8.03, and for their Petition for Review, state and allege as follows:

**I. Prayer for Review/Relief Sought**

Pursuant to Supreme Court Rule 8.03 and K.S.A. 60-2101(b), Appellants respectfully request the Court to review the Order entered by the Court of Appeals, dated July 24, 1995, dismissing the above-captioned appeal due to appellants' failure to file an appeal bond. The decision of the Court of Appeals raises for the first time the constitutional issue of whether Supreme Court Rule 9.03(b), which requires appellants to post an appeal bond in the amount of 125% of the tax assessment by the Director of Taxation, violates due process of law under the Kansas and the United States Constitutions. Pursuant to K.S.A. 60-2101(b), appellants respect-

**II. Date of the Decision of the Court of Appeals**

July 24, 1995

**III. Statement of Issues**

1) Was the Court of Appeals correct in denying Appellants' Motion for Waiver of Bond?

2) Does Supreme Court Rule 9.03 operate in connection with K.S.A. 79-5205(c) to deny due process of law to appellants by financial constraints?

3) Did the Court of Appeals err in dismissing the above-captioned matter for Appellants' failure to post an appeal bond?

**IV. Statement of Facts**

On March 21, 1988, appellants, Mark Goddard and Robert Foster plead nolo contendere to the charges of attempted possession of cocaine and sale of cocaine. On July 15, 1988, and September 29, 1988, the Kansas Department of Revenue issued a "Notice of Assessment of Tax Upon Marijuana and a Controlled Substance" to Robert Foster and Mark Goddard, respectively, in the amount of $1,144,460.00.

On April 23, 1992, a formal hearing was held by the Department of Revenue. On September 15, 1992, the Administrative Hearing Officer designated by the Director of Taxation, Jim Weisgerber, entered an order denying the Appeal of the taxpayers and upholding the assessment of the department.

On October 12, 1992, the taxpayers filed a Notice of appeal to the Board of Tax Appeals. On June 1, 1993, a prehearing conference was held and on June 1, 1994, a Formal Hearing was conducted in the above-entitled matter before the Board of Tax Appeals. On January 30, 1995, the Board of Tax Appeals entered an order affirming assessment of the tax by the Department of Revenue. On February 20, 1995,

the taxpayers filed a Petition for Reconsideration, which was denied by the Board of Tax Appeals in its Order Reconsidering the Board's prior Order of January 30, 1995. On April 7, 1995, the taxpayers filed their Notice of Appeal/Petition for Judicial Review in the Court of Appeals.

Kansas Supreme Court Rule 9.03(b) provides in pertinent part:

> The statutory bond shall accompany the notice of appeal and be filed with the clerk of the appellate courts. Unless otherwise requested, the bond shall be in the amount of 125% of the tax assessed and shall be approved by the clerk. If a bond in a lesser amount is requested, the appellant shall submit a motion pursuant to Rule 5.01 with the notice of appeal in lieu of the bond.

Rule 9.03(b), requires appellants to file a bond in the amount of $1,430,575.00 in order to appeal the subject assessment. On April 7, 1995, pursuant to Supreme Court Rule 5.01, appellants filed a Motion for Waiver of Bond. On May 5, 1995, the Court of Appeals denied appellants' Motion, and instructed the parties to address the issue of an appropriate bond by written response. (See Appellants' Appendix at p. 1, attached hereto and incorporated by reference as if fully set forth herein).

On June 21, 1995, appellants served their Suggestions in Support of Appellants' Motion to Waive bond. On June 26, 1995, the Court of Appeals entered an Order denying appellants' Motion to Waive Bond, and instructing appellants' to file the required bond within 10 days from the date of the Order. (See Appellants' Appendix at p. 2, attached hereto and incorporated by reference as if fully set forth herein).

On July 24, 1995, the Court of Appeals entered an Order dismissing the instant appeal on the grounds that appellants

had failed to file the required bond of $1,430,575.00. (See Appellants' Appendix at p. 3, attached hereto and incorporated by reference as if fully set forth herein).

**V. Argument**

Under Kansas law, the assessment of taxes, penalties and interest by the Director of Taxation is presumed to be correctly determined and assessed. K.S.A. 79-5205(c) provides, in pertinent part:

> The tax penalties and interest assessed by the director of taxation are presumed to be valid and correctly determined and assessed. The burden is upon the taxpayer to show their incorrectness or invalidity.

Therefore, under K.S.A. 79-5205, the burden of proving that the assessment is invalid falls squarely on the shoulders on appellants. Pursuant to K.S.A. 74-2426, a taxpayer aggrieved by a decision of the Board of Tax Appeals may file an appeal directly to the Court of Appeals. As previously mentioned, upon filing the Notice of Appeal to the Court of Appeals, Supreme Court Rule 9.03(b) requires that a bond be posted in the amount of 125% of the tax assessed. In the present matter, in order to appeal the assessment, presumed to be valid as stated in K.S.A. 79-5205(c), under Rule 9.03(b), appellants would have to post a bond in the amount of $1,430,575.00.

The reality of the present situation is that a tax of over $1 million has been assessed against each appellant. Under Kansas law, the tax is presumed to be valid and correctly assessed. In order to overcome the presumption and challenge the assessment, appellants must file an appeal in the Court of Appeals. However, the only way appellants may perfect the appeal is by first posting a bond over $1.4 million, which appellants are simply financially unable to do. In short,

K.S.A. 74-2426, which allows a taxpayer aggrieved by a decision of the Board of Tax Appeals to file an appeal directly to the Court of Appeals offers little more than false hope of justice.

In addition, the instant appeal involves, in part, the constitutionality of the Marijuana and Controlled Substances Act, K.S.A. 79-5201 *et. seq.*, in view of the U.S. Supreme Court's recent decision in *Department of Revenue of Montana v. Kurth Rance, et al.*, 1994 W.L. 237615 (U.S.).

In *Kurth*, the Court struck down Montana's Dangerous Drug Tax on the grounds that the assessment was so excessive that it constituted a punitive "tax". Similarly, in the present matter, appellants contend that the Kansas Marijuana and Controlled Substances Act, like Montana's Dangerous Drug Tax, violates the 5th and 14th Amendments to the United States constitution, and under *Kurth*, supra, the assessment regime under the Act is prohibited by double jeopardy, res judicata and collateral estoppel.

The Board of Tax Appeals refused to apply *Kurth*, supra, noting that the Board is specifically prohibited from ruling on constitutional issues as stated in *Felton Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836 (1958). The Board went on to note that should it decide to apply *Kurth*, supra, it would have to find that Article 52, of Chapter 79 of the Kansas Statutes Annotated is unconstitutional, which under long-standing Kansas law, it is specifically prohibited from doing.

The Board of Tax Appeals is legally precluded from determining the constitutionality of the Kansas Marijuana and Controlled Substances Act. In order to overcome the presumption created in K.S.A. 79-5205(c) that the tax assessment by the Director of Taxation is correct, under the appellate procedure specified in K.S.A. 74-2426, appellants had no al-

ternative but to file the instant appeal with the Court of Appeals. However, in order for the appellants to have their constitutional question heard by the only authority that can decide it, they must pay over One Million Dollars ($1,000,000.00)! It would appear that there is a price for justice, and a rather high one at that! Only rich Americans can afford this justice. The appellants cannot afford it. They are being denied due process and equal protection of the law as guaranteed by the Kansas Constitution and the U.S. Constitution.

Appellant Robert Foster is employed as an over-the-road truck driver, and appellant Robert Foster is employed as a building contractor. Given appellants' occupations, they are simply unable to pay in excess of $1.4 million as a bond in order to appeal the findings of the Board of Tax Appeals.

Taking into consideration the fact that appellants have the burden of proving that the assessment of the subject excise tax is invalid, coupled with the fact that under Kansas law an appeal of this constitutional issue must be made to the Court of Appeals, requiring appellants to pay over $1.4 million to perfect this Appeal certainly is a denial of due process and in direct violation of the Kansas and United States Constitutions.

Somewhat akin to criminal law, the presumption under K.S.A. 79-5205(c) is one of "guilty" unless the taxpayer is able to prove his "innocence". Requiring appellants to pay well over a million dollars in order to defend their innocence deprives these taxpayers of the due process of law to which they are entitled under both the Kansas and the United States Constitutions. In addition, denying appellants the right to appeal the constitutionality of the Kansas Marijuana and Controlled Substances Act merely because of the taxpayers inability to post the bond would cause irreversible harm.

Under Rule 9.03(b), the Court of Appeals has discretion to modify the required bond. As discussed at length in appellants' Suggestions in Support of Appellants' Motion to Waive Bond, shortly before the subject assessment, the Department of Revenue seized approximately $10,000.00 cash from appellants. Balancing the extremely limited financial resources of appellants against appellants' constitutional rights to appeal, suggests that the $10,000.00 could appropriately serve as the required appeal bond in this matter, or in the alternative, a bond could be set within the financial means of appellants. As previously suggested, a bond in this matter, or in the alternative, a bond could be set within the financial means of appellants. As previously suggested, a bond in the amount of $5,000.00 would be reasonable given the financial restraints of appellants.

To require an appeal bond in a larger amount would serve only to deny the taxpayers the constitutionally guaranteed due process of law to which they are entitled.

As the decision of the Court of Appeals, reflected in its Order dated July 24, 1995, raised for the first time the constitutionality of Supreme Court Rule 9.03(b), under K.S.A. 60-2101(b), appellants respectfully request this Court to enter an Order permitting review of the issues raised herein.

The chilling reality brought to light by the instant matter is that judicial review under Rule 9.03(b) is available only at a certain price, and at the cost of due process of law.

WHEREFORE, appellants respectfully request this Court to enter an Order granting review of the Order of the Court of Appeals dismissing the instant appeal for appellants'

failure to post bond, and for such other and further relief as the Court may deem to be just and equitable.

Richard W. Parker, P.A.

By: /s/

Richard W. Parker KS #10470
7600 W. 110th Street, Suite 104
Overland Park, KS 66210
(913) 451-1980
ATTORNEY FOR APPELLANTS

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Review was served upon the following parties by depositing same in the U.S. Mail, postage prepaid, on this 22nd day of August, 1995:

Mr. Jack Shriver, Chairman
Board of Tax Appeals
915 S.W. Harrison
4th Floor
Topeka, KS 66612

Director of Taxation
Docking State Office Building
915 S.W. Harrison
3rd Floor
Topeka, KS 66612

Brian Cox, Attorney
Legal Services Bureau
Kansas Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66612-1518

Mark Burghart
General Counsel
Dept. of Revenue
Docking State Office Building
915 S.W. Harrison
Topeka, KS 66212

Carl Edwards, Attorney
Board of Tax Appeals
Docking State Office Building
915 S.W. Harrison
4th Floor
Topeka, KS 66612

/s/
Richard W. Parker

## APPELLANTS' APPENDIX


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**No. 95-73,903**

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

***In the Matter of the Appeal of Mark Dean Goddard, et al.***

**ORDER**

Appellants' motion to waive bond is denied on present showing. The parties are ordered to address the issue of an appropriate bond by written responses to be served and filed on or before May 22, 1995. Appellants' failure to respond will result in dismissal of the appeal without further notice.

DATED: May 5, 1995.

FOR THE COURT

/s/

J. P. BRAZIL, Judge

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

RICHARD W PARKER
7600 W 110TH ST SUITE 104
OVERLAND PARK KS 66210-2392

IN THE MATTER OF THE APPEAL OF
MARK DEAN GODDARD, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

AND Doc. No. 95-73903-A

IN THE MATTER OF THE APPEAL OF
ROBERT LEE FOSTER, FROM AN ORDER
OF THE DIRECTOR OF TAXATION
ON ASSESSMENT OF MARIJUANA
AND CONTROLLED SUBSTANCES TAX

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

RESPONSES TO COURT ORDER.
MOTION TO WAIVE BOND DENIED. APPELLANT'S HAVE 10 DAYS TO FILE THE REQUIRED BOND.

BOTA DOCKET NOS. 92-16575-DT AND 92-16576-DT
DATE: 06/26/95.

CAROL G. GREEN
CLERK

No. 95-73,903

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

*In the Matter of the Appeal of Mark Dean Goddard, et al.*

**O R D E R**

In the absence of a response to this court's order dated June 26, 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b).

DATED: July 24, 1995.

FOR THE COURT

/s/_____

EDWARD LARSON, Judge